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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ERIC FOSTER, Plaintiff and Appellant, v. BAE SYSTEMS INC., et al., Defendants and Respondents.	A141373, A141727 (San Francisco City & County Super. Ct. No. CGC-10-504948)
ERIC DISMUKE, Plaintiff and Appellant, v. BAE SYSTEMS INC., et al., Defendants and Respondents.	(San Francisco City & County Super. Ct. No. CGC-11-509408)
CARLISA COLEMAN, Plaintiff and Appellant, v. BAE SYSTEMS INC., et al., Defendants and Respondents.	(San Francisco City & County Super. Ct. No. CGC-11-510446)
BARBARA BROOKS, Plaintiff and Appellant, v. BAE SYSTEMS INC., et al., Defendants and Respondents.	(San Francisco City & County Super. Ct. No. CGC-11-512095)

Plaintiffs Eric Foster, Eric Dismuke, Carlisa Coleman, and Barbara Brooks (collectively, plaintiffs) appeal from summary judgment orders entered in several consolidated workplace discrimination actions. The actions were brought against BAE Systems San Francisco Ship Repair Inc. (BAE),[1] a private shipyard, and two of BAE's top managers, Hugh Vanderspek and James Vaught. Plaintiffs argue that, contrary to the trial court's orders, there are triable issues of fact as to their claims for harassment, discrimination, and retaliation. Plaintiffs also argue the court erred in denying their motions to tax costs. We reverse the trial court's grant of summary judgment as to Foster's and Dismuke's claims for harassment. We also reverse and remand the trial court's award of costs. We affirm in all other respects.

I. BACKGROUND

BAE provides repair services for vessels in its San Francisco shipyard. BAE began operating the yard in June 2005. The yard spans about 21.1 acres and is used by hundreds of unionized and nonunionized workers, as well as third parties, including vendors and subcontractors, at all hours of the day and night. The terms and conditions of BAE's union-represented employees are governed by a single collective bargaining agreement (CBA). The ship repair business is project-based, and thus BAE has fluctuating staffing requirements. Workers are frequently laid off and recalled as projects begin and conclude. Pursuant to the CBA, layoffs and recalls are based on seniority. Employees in certain supervisory positions, such as forepersons and "key persons,"[2] may be retained when staffing levels are reduced.

Vanderspek is BAE's general manager, and has responsibility for overseeing BAE's day-to-day operations. He was appointed to the post in February 2008. Vaught has been BAE's director of production since September 2008. His duties include

[1] Plaintiffs also sued two BAE-related entities, BAE Systems Inc. (Inc.) and BAE Systems Ship Repair Inc. (Ship Repair). We refer to BAE, Vaught, Vanderspek, Inc., and Ship Repair, collectively, as defendants.

[2] BAE's CBA permits each union production department to designate a unionized employee who has particular skills and abilities as a "key person."

facilitating production activities, supervision of the managers of BAE's production departments (including the labor, rigging, steel, paint, and utility departments), and ensuring ship repair projects are properly staffed, scheduled, and budgeted. Prior to being appointed director of production, Vaught was the superintendent of BAE's labor and paint departments.

Plaintiffs are African-American employees of BAE. Foster began working at the shipyard in 2006 in BAE's labor department. In 2009, Foster and much of the labor department were laid off. Foster was later recalled and joined the paint department. Dismuke began working at the yard in or around 1988 as a shipfitter trainee in the steel department. Dismuke eventually became a journeyman, and also held the positions of "lead person"[3] and foreperson. In June 2009, Dismuke was demoted from foreman to journeyman. Coleman began working at the yard as a painter trainee in 1999. She obtained journeyman status as a painter in 2003. Brooks initially performed janitorial duties for the facilities department. In October 2008, the facilities department was dismantled, and Brooks was reassigned to the utilities department. In May 2012, after this litigation was initiated, Brooks was laid off. She has not yet been recalled to work.

Plaintiffs filed separate complaints with the Department of Fair Employment and Housing (DFEH) against BAE, Vanderspek, and Vaught in 2010 and 2011, asserting claims for harassment, discrimination, retaliation, and failure to prevent discrimination and retaliation. The DFEH issued right to sue letters, and plaintiffs filed complaints in San Francisco Superior Court. The complaints named two additional BAE-related entities, Inc. and Ship Repair. Plaintiffs' cases were consolidated with cases filed by several other African-American employees. A private referee was appointed to manage the parties' discovery disputes.

Inc. and Ship Repair moved for judgment on the pleadings, which the trial court granted because those parties had not been specifically identified in plaintiffs' DFEH

[3] A "lead person" reports to the foreperson and assists in directing journeymen and trainees.

complaint. The court also granted defendants' motions for summary judgment as to all of plaintiffs' claims. Plaintiffs challenged the costs claimed by Inc. and Ship Repair by way of motions to tax costs. Those motions were largely denied. Plaintiffs did not timely move to tax costs awarded to BAE, Vanderspek, and Vaught, but did file a motion to be relieved of that default, as well as motion for a new trial on the costs awarded. The trial court granted the motions for relief from default but denied the motions for a new trial. This appeal followed.

II. DISCUSSION

A. *Standard of Review*

The standard of review for a summary judgment motion in favor of a defendant is well settled. We "independently assess the correctness of the trial court's ruling by applying the same legal standard as the trial court in determining whether any triable issues of material fact exist, and whether the defendant is entitled to judgment as a matter of law." (*Rubin v. United Air Lines, Inc.* (2002) 96 Cal.App.4th 364, 372, fn. omitted.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the [plaintiff] in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) The trial court must view that evidence, and any reasonable inferences from that evidence, "in the light most favorable to" the plaintiff. (*Id.* at p. 843.) We review the trial court's ruling de novo. (*Id.* at p. 860.) The trial court's evidentiary rulings are reviewed for abuse of discretion.[4] (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.)

[4] Plaintiffs argue the trial court erred by striking supplementary evidence they filed after briefing on the summary judgment motions had concluded. Plaintiffs rely on Code of Civil Procedure section 437c, subdivision (b)(2), which provides that any opposition to a motion for summary judgment shall be filed "not less than 14 days preceding the noticed or continued date of [the] hearing." They argue their supplementary evidence was timely because it was filed at least 14 days before the continued hearing date on the motions for summary judgment, even though the evidence was filed *after* defendants' reply briefs. We find no abuse of discretion. Section 437c does not allow parties to rewrite their briefs upon the continuance of a hearing. In any event, it is not clear how

B. *Harassment*

1. Applicable Law

The California Fair Employment and Housing Act (FEHA) provides that it is unlawful for "an employer, . . . or any other person, because of race, . . . sex, [or] gender, . . . to harass an employee . . . . Harassment of an employee . . . shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. . . . An entity shall take all reasonable steps to prevent harassment from occurring. . . ." (Gov. Code,[5] § 12940, subd. (j)(1).) This provision of the FEHA is violated " '[w]hen the workplace is permeated with discriminatory intimidation, ridicule and insult that is " 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' " ' [Citations.] This must be assessed from the 'perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.' [Citation.] And the issue of whether an employee was subjected to a hostile environment is ordinarily one of fact."[6] (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 263–264.)

"In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or

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plaintiffs' late-filed evidence would have changed the outcome of the summary judgment motions.

[5] All further statutory references are to the Government Code unless otherwise indicated.

[6] As plaintiffs contend, evidence of biased personnel management action may also be used to prove a harassment claim, "so long as that evidence is relevant to prove the communication of a hostile message." (*Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 708.) But for the sake of clarity, we discuss the personnel management actions raised by plaintiffs in the discrimination section below. And since we find plaintiffs have failed to raise a triable issue as to these personnel management actions, they have no bearing on plaintiffs' harassment claims.

a generalized nature." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610 (*Fisher*).) " '[W]hile an employee need not prove tangible job detriment to establish a . . . harassment claim, the absence of such detriment requires a commensurately higher showing that the . . . harassing conduct was pervasive and destructive of the working environment.' " (*Ibid.*) Hostile work environment claims must be evaluated in light of the totality of the circumstances. (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1529.) Those circumstances may include " 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.)

" 'Evidence of the general work atmosphere, involving employees other than the plaintiff, is relevant to the issue of whether there existed an atmosphere of hostile work environment. . . .' [Citation.] . . . However, one who is not personally subjected to [harassment] must establish that [he or] she personally witnessed the harassing conduct and that it was in [his or] her immediate work environment." (*Fisher, supra,* 214 Cal.App.3d at pp. 610–611.) "[P]ersonal observation is not the only way that a person can perceive, and be affected by, harassing conduct in the workplace. One can also be affected by knowledge of that harassment. [However,] mere workplace gossip is not a substitute for proof. Evidence of harassment of others, and of a plaintiff's awareness of that harassment, is subject to the limitations of the hearsay rule. It is not a substitute for direct testimony by the victims of those acts, or by witnesses to those acts." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 521.) Additionally, evidence a defendant harassed another employee outside of the presence of the plaintiff may, in certain circumstances, be admissible and relevant to prove the defendant's intent. (See *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114–115 (*Pantoja*).)

"The FEHA imposes two standards of employer liability for . . . harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a

nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. (§ 12940, subd. (j)(1).) This is a negligence standard. [Citation.] Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor' (§ 12940, subd. (j)(1)), by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040–1041.)

The statute of limitations for filing a harassment complaint is one year. (§ 12960, subd. (d).) "[W]hen an employer engages in a continuing course of unlawful conduct under the FEHA . . . and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, *either* when the course of conduct is brought to an end . . . *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823.) An employer's persistent failure to eliminate a hostile work environment is a continuing violation if "(1) the [employer's] actions are sufficiently similar in kind; (2) they occur with sufficient frequency; and (3) they have not acquired a degree of 'permanence' so that employees are on notice that further efforts at informal conciliation with the employer to obtain accommodation or end harassment would be futile."[7] (*Id.* at p. 802.)

[7] In support of their claims for harassment, each plaintiff's brief includes an identical discussion of what they refer to as "general harassment." Much of this section is based on inadmissible hearsay. For example, while plaintiffs assert Vanderspek referred to an African-American welder as " 'Aunt Jemima' " and " 'the fat black girl,' " they have not pointed to any testimony from a person who actually heard Vanderspek make the comment. Other comments discussed in this section, which were not made by Vaught or Vanderspek or heard by plaintiffs, have no bearing on either defendant's intent or on plaintiffs' work environment. Indeed, it is unclear whether plaintiffs were even aware of most of these comments.

2. Foster's Racial Harassment Claim

Turning to Foster's claim for racial harassment, we find he has raised a triable issue for the jury.

Foster's evidence shows he was the subject of or directly exposed to harassing conduct by Vanderspek. Foster testified Vanderspek once confused him with another African-American employee and accused him of being a "lazy no-good worker." Foster asked Vanderspek: "Do we all look alike?" According to Foster, Vanderspek then "smirked, shrugged his shoulders, and walked off." On another occasion, a paint representative visiting the shipyard confused two female African-American employees. Foster later overheard Vanderspek say to the paint representative: " 'Don't worry about it. They all look alike anyway.' " Foster also testified Vanderspek was overly critical of African-American employees, including himself, while he was generally friendly and congenial around Caucasian employees. According to Foster: "This man [(Vanderspek)] does not talk to black people. Any time [Vanderspek] talks to black people it's to say something negative to them like get a broom, get a shovel, sweep something. When he walks around and talk[s] to white people, it's all smiles and cheers and everything else."

Defendants argue we should not assume Vanderspek's comments were made in reference to African-Americans. For example, as to Vanderspek's statement " 'They all look alike,' " defendants contend there is no evidence Vanderspek was aware the visitor to the yard had mistaken one African-American woman for another. But looking at the evidence in the light most favorable to Foster, as we must on summary judgment, it is not unreasonable to infer Vanderspek's comments were racially charged. Defendants may be right that it is more reasonable to infer Vanderspek's statements were inoffensive, or at least not offensive enough to create a hostile work environment. However, that question is better left to the jury.

With respect to Vaught, one of the earliest incidents complained of by Foster occurred in 2007. A noose was hung from the ceiling in the electrical shop. It is unclear from the record how long the noose was left there, but the parties assert it was about a

week. When asked about the noose, Vaught said: " 'This is a shipyard. We tie all types of knots here.' "

As to more recent incidents of alleged harassment, Foster testified Vaught unfairly criticized and singled out the work habits of numerous African-American employees, including himself. On numerous occasions, Vaught instructed Foster to " 'get your ass back to work.' " Foster believes Vaught has criticized at least six African-American employees, including himself, for walking too slow when coming back from lunch. It is Foster's impression Vaught singled out African-Americans for walking slowly and not working.

Defendants argue the noose incident is time-barred. Even if they are correct, it is powerful evidence of Vaught's intent. As such, it lends credibility to Foster's claim that Vaught frequently treats African-American employees differently than non-African-American employees, and that racial animus has motivated Vaught's behavior. We concede that Vaught's criticism of employee's work habits and general demeanor towards certain groups of employees, without more, may not be enough to show a pervasive and severe hostile work environment. However, when taken together with the other evidence discussed above, it is sufficient to raise a triable issue for the jury.

Accordingly, we find the trial court erred in granting defendants' motion for summary judgment as to Foster's claim for harassment.

3. Dismuke's Racial Harassment Claim

We also find the trial court erred in granting summary judgment on Dismuke's harassment claims, at least as it relates to Vanderspek and BAE. At least some of the evidence presented by Dismuke indicates this claim should be decided by a jury. Dismuke testified Vanderspek "hounded" him, and would micromanage his work to an unreasonable degree. Likewise, David King, the former superintendent of the steel department, testified Vanderspek "paid an unreasonable amount of attention to Eric Dismuke, whatever project Eric was in charge of [Vanderspek] would physically . . . go out to check on the job himself, which wasn't normal." King also described Vanderspek as overly and unreasonably critical of Dismuke's work.

Dismuke claims he also witnessed Vanderspek harass other African-American employees. He stated Vanderspek would give African-American employees, including Foster and Brenda King, a look "like he bit into something bitter." Dismuke also testified Vanderspek would joke and talk with non-African-American employees, but would "get on" African-American employees and use profanity when speaking with them. According to Dismuke, African-Americans were also assigned the "dirtiest" jobs, such as cleaning out the sumps. Dismuke also heard about incidents of harassment of African-Americans from coworkers.

In January 2012, Dismuke heard a racial joke in the yard. One production manager called another " 'imitation black.' " The second production manager responded: " 'Hello, my brother.' " Dismuke testified he was "[a] little bit" offended by the joke, but he did not report it to human resources.

Taken together, this evidence is sufficient to raise a triable issue as to whether Vanderspek and BAE are responsible for creating and allowing a severe and pervasive hostile work environment. As there is little evidence concerning Vaught's interactions with Dismuke, or his role in the incidents discussed above, the trial court properly granted summary judgment as to him.

4. Coleman's Race and Gender Harassment Claims

Having reviewed the record, we are not convinced that Coleman has raised any triable issues as to her claims for racial and gender harassment.

Coleman's briefing describes a few incidents of alleged harassment directed at her. One involves another painter, Roberto Alvarez. In November or December 2010, while Coleman was present, Alvarez commented to Coleman's boyfriend: "What's wrong, Andre? You tired because you and Carlisa [(Coleman)] boom boom too much last night?" Coleman reported the incident, and BAE hired a third party to investigate. Alvarez was suspended for a week.

After Alvarez returned to work, Coleman saw him standing on a boom using a high-pressure hose to wash and clean a manlift. Coleman believed this was a safety violation, and "jiggle[d]" the hose line to get Alvarez's attention. Alvarez momentarily

turned off the hose as Coleman approached and then began spraying again, causing sand and debris to hit Coleman. Coleman reported the incident to Vaught, who spoke to witnesses. Vaught told Coleman that Alvarez would be written up for the safety violation, but not his conduct towards her. Vaught held a meeting about the incident the following day, which Coleman apparently did not attend. Coleman was told that, at the meeting, Vaught talked to Hispanic painters and asked them to write an account of the incident, and to indicate whether Coleman "pushed somebody." Sometime thereafter, BAE circulated a memo indicating it was improper to jiggle a hose line to get another worker's attention.

This evidence is insufficient to raise a triable issue. Alvarez's "boom boom" comment was offensive, but BAE took immediate corrective action by investigating the incident and suspending Alvarez. BAE also wrote up Alvarez for violating safety protocol after the hose incident. Foster's claim that the investigation into the incident was biased is not compelling, as it is predicated on hearsay regarding what happened at a meeting she did not attend. Moreover, as Coleman concedes, her account of the incident was contradicted by another witness. Coleman also asserts she was "made the subject of ridicule" because of the memo warning against jiggling hose lines. But there is no indication Coleman was mentioned in the memo, and she has presented no evidence suggesting BAE lacked cause to issue new rules regarding safety protocols.

Coleman also complains BAE failed to respond to harassment by nonsupervisory coworkers. Most of those incidents are time-barred, including BAE's purported failure to respond to an incident in 2010 during which a coworker called Coleman a "fucking bitch," as well BAE's alleged failure to adequately investigate a sexual harassment claim Coleman filed in 2004. Contrary to Coleman's assertion, the continuing violation doctrine does not toll the statute of limitations, especially for the 2004 incident, which occurred before BAE even took over the yard. Moreover, the record indicates BAE's actions or failure to act obtained a degree of permanence before the statutory period, as Coleman did not attempt to pursue an alternative resolution with BAE. One of the incidents complained of by Coleman did occur during the statutory period. Jose

Valenzuela flicked his tongue at Coleman and called her "Honey." But human resources spoke with Valenzuela about the incident, and it appears he was warned.

Nor can Coleman survive summary judgment based on offensive comments made by Vaught and Vanderspek. Coleman testified she has never personally heard Vaught or Vanderspek make racially offensive remarks. Coleman does contend she was offended when Vaught told her she should have checked with him before accepting the position of shop steward. But to the extent such a remark could be considered offensive, it is not severe enough to support a claim for harassment. Coleman also asserts Vaught and Vanderspek refused to speak with her, even though she remains shop steward for the painters' union. However, the deposition testimony on which she relies merely indicates Vaught and Vanderspek have become less friendly towards Coleman since she sued them for harassment and discrimination.

Coleman argues she is also aware of offensive comments made by Vaught and Vanderspek to other employees. However, most of the evidence concerning these comments is hearsay. To the extent the evidence concerning these remarks is admissible, it is insufficient to raise a triable issue as to the severity or pervasiveness of the alleged harassment since Coleman did not actually witness the remarks. (See *Yuknis v. First Student, Inc.* (7th Cir. 2007) 481 F.3d 552, 555–556 ["The more remote or indirect the act claimed to create a hostile working environment, the more attenuated the inference that the worker's working environment was actually made unbearable . . . ."].)

Coleman asserts she has witnessed and heard about discrimination against other African-American employees. Her briefing does not describe the specific conduct at issue, but instead provides voluminous record citations for the court to sort through on its own. Setting aside that an appellant's brief must "[p]rovide a summary of the significant facts" (Cal. Rules of Court, rule 8.204(a)(2)(C)), the citations provided by Coleman often refer to speculative testimony, as well as incidents she did not actually witness. For example, Coleman testified Brenda King was discriminated against because she was not promoted to lead person or foreman, but it is unclear from Coleman's testimony whether King was qualified for promotion or who was promoted ahead of her. In any event,

harassment is not sufficiently pervasive or severe where it is based solely on gossip about employment actions concerning other employees.

Finally, Coleman asserts she was exposed to racist and sexist graffiti. When asked about the matter during one of her depositions, Coleman stated she had not personally seen the graffiti, but other employees told her about it and showed her cell phone pictures of the graffiti. One employee told Coleman the graffiti was reported to management, but it was left there "for months." In another deposition, Coleman stated she "glanced" at graffiti on a trash can. Coleman said Dismuke told her he spoke to human resources manager Bill Cahill about the matter, but Cahill would not "even come out of his office and cover the stuff up." Coleman further testified the graffiti was eventually painted over, but she could not specify when, except to say that it took more than a day. This evidence cannot support Coleman's claim for harassment because it is almost entirely hearsay. Moreover, Coleman cannot base her claim on graffiti to which she was not personally exposed.

To the extent Coleman's evidence regarding graffiti was admissible, there is no indication defendants or any of their employees are responsible for that graffiti. Relying on *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, plaintiffs argue BAE had a duty to locate and discipline the perpetrators. In that case, the Ninth Circuit found there were triable issues as to the plaintiff's harassment claim because, although the employer painted over racist graffiti, it did not otherwise take the issue seriously. (*Id.* at pp. 1120–1121.) One supervisor joked he was responsible for the graffiti and then made a " 'humorous' " comment that had racial overtones. (*Id.* at p. 1121.) And management did not issue a warning until the plaintiff filed a complaint with the Equal Employment Opportunity Commission. (*Ibid.*) In contrast, here, Vanderspek distributed a memorandum in February 2012 stating graffiti would not be tolerated in the yard and employees found engaging in graffiti would be terminated. Around the same time, BAE facilities personnel began conducting regular inspections where graffiti had been previously been spotted. We are also skeptical of plaintiffs' contention that BAE had a

duty to locate the perpetrators, since the yard spans over 20 acres and is used by hundreds of people, many of whom are not BAE employees, at all hours of the day.

5. Brooks's Race and Gender Harassment Claim

Brooks's claim for race and gender harassment also fails. As an initial matter, it is predicated almost entirely on inadmissible hearsay. For example, in her declaration opposing summary judgment, Brooks stated she had "heard about many things that Hugh Vanderspek and Jim Vaught have done and said that were harassing and discriminatory to African-Americans and women." She then goes on to describe several remarks she heard about from unidentified individuals. Likewise, at least 17 pages of Brooks's deposition transcript describe offensive remarks Brooks heard about secondhand. Brooks argues these statements are not hearsay because they are not submitted for the truth of the matter asserted. That would be the case if Brooks personally heard Vaught or Vanderspek make the remarks at issue. But she did not. Instead she is relying on out-of-court statements made by other individuals who claim they accurately heard Vaught and Vanderspek make the offensive remarks. Even if there was admissible evidence concerning Vaught's and Vanderspek's remarks, Brooks's connection to the conduct is so remote that it cannot, without more, support a claim for harassment.

In her summary judgment declaration, Brooks also claims she was called a "bitch" by Mike Madding, a coworker, and she was exposed to graffiti in the shipyard with offensive words like "pussy" and "nigger." Further, Brooks claims she witnessed a ship superintendent ask an employee to pick up a banana peel. According to Brooks, the implication is the employee was a "monkey," a derogatory term for African-Americans. This evidence is insufficient to raise a triable issue. While being called a "bitch" is offensive, it only happened once, and the comment was made by a nonsupervisory employee. Moreover, BAE investigated the incident immediately. Based on multiple witness accounts, it determined the comment was disputed and not substantiated, but nevertheless BAE warned Madding that such language would not be tolerated. As to the graffiti, it is unclear whether it was ever reported. In any event, BAE issued a memo in 2012 stating persons caught posting graffiti would be subject to discipline and

implemented a procedure to regularly inspect for graffiti. The banana peel comment was not directed at Brooks and it is unclear whether the incident was ever reported. We conclude that incident, along with Madding's remarks, are insufficient to establish a severe or pervasive hostile work environment.

C. *Discrimination*

1. Applicable Law

"Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.) "In California, courts employ at trial the three-stage test that was established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, to resolve discrimination claims . . . ." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520, fn. 2 (*Reid*).) At trial, the employee must first establish a prima facie case of discrimination by providing evidence that "(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz*, at p. 355.) "Once the employee satisfies this burden, there is a presumption of discrimination, and the burden then shifts to the employer to show that its action was motivated by legitimate, nondiscriminatory reasons. [Citation.] A reason is ' "legitimate" ' if it is 'facially unrelated to prohibited bias, and which if true, would thus preclude a finding of discrimination.' [Citation.] If the employer meets this burden, the employee then must show that the employer's reasons are pretexts for discrimination, or produce other evidence of intentional discrimination." (*Reid*, at p. 520, fn. 2, italics omitted.)

In the context of a motion for summary judgment brought by the employer, "[a]ssuming the complaint alleges facts establishing a prima facie case that unlawful disparate treatment occurred, the initial burden rests on the employer (moving party) to produce substantial evidence (1) negating an essential element of plaintiff's case or (2) (more commonly) showing one or more legitimate, nondiscriminatory reasons for its

action against the plaintiff employee . . . . [¶] . . . The burden then shifts to the plaintiff employee (opposing party) to rebut defendant's showing by producing substantial evidence that raises a rational inference that discrimination occurred; i.e., that the employer's stated neutral legitimate reasons for its actions are each a 'pretext' or cover-up for unlawful discrimination, or other action contrary to law or contractual obligation." (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2015) ¶¶ 19:728–19:729, p. 19-117, italics omitted.) By applying *McDonnell Douglas*'s[8] shifting burdens of production in the context of a motion for summary judgment, " 'the judge [will] determine whether the litigants have created an issue of fact to be decided by the jury.' " (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805–807 (*Horn*).)

"[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004–1005.) "[T]he employee [cannot] simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee ' "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [. . . asserted] non-discriminatory reasons.' " ' " (*Horn*, *supra*, 72 Cal.App.4th at p. 807, italics omitted.)

The statute of limitations for discrimination claims is one year. (§ 12960, subd. (d).) The continuing violations doctrine, discussed in section II.B.1., *ante*, may toll the statute of limitations under certain circumstances. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1057–1058.)

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[8] *McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. 792 (*McDonnell Douglas*).

2. Foster's Discrimination Claim

Foster's claim for discrimination is predicated on six sets of allegedly adverse employment actions: (1) BAE terminated Foster and denied him a light duty work assignment in 2007; (2) BAE refused to promote Foster to "key person" in the paint department and, as a result, Foster lost seniority status; (3) non-African-American foremen were permitted to work while Foster was laid off; (4) BAE failed to fairly compensate Foster for his work as a lead person; (5) BAE failed to make Foster a permanent lead person; and (6) Foster was suspended in connection with a work place accident in May 2012. We find Foster has failed to raise a triable issue as to any of these actions.

a. *2007 Termination*

In or around 2007, Foster injured his arm on the job. He claims BAE could have easily placed him on light duty while he was recovering, as it did with other employees, but instead Foster was forced to return to full duty. Foster also claims that, while he was injured and on medication that made him drowsy, Vaught moved around his schedule, making it difficult for him to get to work on time. Vaught gave Foster a verbal warning for being tardy and subsequently fired him. BAE later called him back to work.

Defendants contend this incident is time-barred, as it occurred more than one year prior to the filing of Foster's complaint. Foster counters the continuing violations doctrine tolls the statute of limitations for this particular incident. As discussed above, to invoke the continuing violations doctrine, a plaintiff "must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." [Citation.] The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.' " (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 64.) Since Foster's 2007 termination is a discrete event, disconnected from the alleged discriminatory conduct during the statutory period, we find the continuing violations doctrine does not apply.

b. *Loss of Seniority*

In or around 2009, BAE began subcontracting out laborers' work and, as a result, Foster and other laborers were laid off. In August 2009, Foster accepted a position in BAE's paint department and became a member of the painters union. Foster was not given credit for his time in the laborers union, and thus lost the seniority status that he had previously accrued. Foster claims he could have maintained his seniority if he had been designated a key person in the paint department within one year of his transfer, but his requests for such a designation were rebuffed. He also asserts a non-African-American employee, Julio Rios, did not lose his seniority when he was transferred to another department.

Foster does not appear to challenge defendants' decision to subcontract out the work of the laborers department. Rather, he takes issue with defendants' failure to place him in a position that would have allowed him to retain his seniority. The problem with this argument is there is no indication such a position existed. (*McDonnell Douglas*, *supra*, 411 U.S. 792, 802 [plaintiff must show "he applied and was qualified for a job for which the employer was seeking applicants"].) Foster himself testified there had never been a key person in the paint department. Moreover, Foster's claim that Rios did not lose his seniority when he was transferred to another department is based on hearsay relayed to him by Coleman.

In his reply brief, Foster argues other non-African-Americans who previously worked in the labor department were given transfers in such a way that their seniority was preserved. However, he provides no record citations in support. And to the extent there were key person positions available in other departments, Foster has yet to identify them. Foster also argues the evidence discussed above does not explain why a key man position could not be created for him. But Foster cannot base his discrimination claim on defendants' failure to create a new position after his old one was eliminated. (Cf. *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1224 [". . . California law is emphatic that an employer has no affirmative duty to create a new position to accommodate a disabled employee . . . ."].)

c. *Manipulation of Callback Rules*

Foster claims defendants manipulated the layoff and callback rules to his detriment. Foster testified that, while he was laid off from the labor department, a foreman from the painters department was performing work on the docks that should have been performed by a laborer, and defendants also allowed a foreman from the laborers department to "run" paint jobs Foster "was clearly capable of running." Foster could not recall how many paid hours he lost as a result of these actions.

We are not persuaded these facts raise a triable issue. As an initial matter, it is unclear if the persons called back before Foster were not African-American. Even if they were not, these employees were foremen, and thus were not similarly situated to Foster. Under the CBA, employees in such supervisory positions may be retained without regard seniority.

Foster argues the CBA did not permit BAE to lay him off while a foreperson from a different department did his work. But Foster's discrimination claim is based on his status as an African-American, not as a member of a particular department. In any event, the CBA provision on which Foster relies states: "Seniority shall apply to the classifications of the Craft or Union as set forth in this Agreement . . . ." It does not expressly forbid BAE from favoring supervisory employees in certain departments over nonsupervisory employees from others.

d. *Lead Person Without Pay*

Foster testified Vaught refused to make him a lead person, but he was eventually appointed to the post when Vaught was absent due to a surgery. Foster claims the position was supposed to pay an extra $1 per hour, but he did not receive any additional compensation for his work. Foster asked Dan Lambert, his supervisor, about the discrepancy. Lambert confirmed Foster was owed additional pay and said he would look into it. Foster did not receive the additional pay in his next paycheck, and he left the issue alone after Lambert said he was still working on it.

This incident, without more, is insufficient to raise a triable issue as to discrimination. To the extent Foster attributes racial animus to Lambert, his account is

inconsistent, since Foster also testified Lambert has treated him fairly. And since Foster dropped the matter before consulting with human resources, we can only speculate about the reasons why the additional pay was withheld. Moreover, while it is unclear from the record exactly how much was withheld from Foster's paycheck, the amount appears to be de minimis, since this incident involved only $1 per hour over the course of a single pay period.

e. *Permanent Lead Person Status*

Vaught eventually relieved Foster of his lead person duties on the ground that Foster's crew was "standing around." Foster asserts his demotion was unjustified, and it was his impression "everybody was working." Foster was replaced as lead person by Eric Van, who is also Black. Foster testified Van may have worked as lead person "once more," but he is not sure. He also claims that, unlike him, non-African-Americans were able to keep their lead person status "from job to job to job." Foster now argues he has raised a triable issue as to discrimination because the evidence shows non-African-Americans are given positions as permanent lead persons, while African-Americans are not.

We are not convinced. At his deposition, Foster could recall only two other employees in the paint department who had been appointed as lead person, Van, who is Black, and Jose Venezuela,[9] who is Hispanic. Foster also testified everyone in the department was qualified to act as a lead person, and Venezuela was more qualified than himself in some respects. Based on this evidence, we can hardly conclude BAE was promoting unqualified non-African-American employees over more skilled African-American employees. Nor can we infer there was a permanent lead person in the paint department. Foster's testimony on this point in a later deposition is vague. Foster claimed Caucasian employees were able to keep their lead person status, but did not

[9] In a declaration filed in support of defendants' motion for summary judgment, BAE's human resources manager William Cahill stated that based on his review of BAE records, BAE had never employed an individual named Jose Venezuela but did employ a painter named Jose Valenzuela.

identify in what departments these employees worked or provide any further specifics, other than to state he had once seen the paycheck of a White pipefitter who worked as a lead person.

f. *Discipline*

Foster asserts he was unfairly disciplined in May 2012 in connection with a workplace accident. The accident occurred while several employees were trying to move a dry dock block. Several employees first tried moving the block with a chain, but the chain broke. Foster then retrieved a wire rope from some nearby riggers. The rope was wrapped around the block and tied to a fork lift. One of the workers failed to move his hands in time, and two of his fingers were severed by the wire and another was twisted and crushed. Following an investigation by a special committee, Foster was suspended for three days without pay. A Latino carpenter also received a three-and-a-half-day suspension. Written warnings were issued to an African-American rigger, a Caucasian rigger, and a Latino foreman in the paint department.

Foster asserts his discipline constituted racial discrimination, but the evidence indicates otherwise. Foster does not dispute he was involved in the efforts to move the dry dock block, or that another employee was seriously injured during the course of that work. The special committee minutes indicate the attempts to move the block were mishandled and the employees involved should have ceased their efforts after the chain broke, as they lacked the necessary experience and supervision. That reasonable persons might disagree as to who was more at fault for the incident does not lead to the rational inference Foster was suspended because he is African-American. (See *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 756 ["to defeat a summary judgment motion, a plaintiff must do more than raise an issue whether the employer's action was unsound, unfair, wrong or mistaken"].) That inference becomes even more tenuous when we consider other non-African-American employees were also disciplined in connection with the incident, including a Latino who received harsher discipline than Foster.

Foster argues his discipline was unfair because he was not assigned to the job of moving the dry dock block, he did not attach the wire rope or direct other employees to do so, he did not operate the forklift, and he was not attending to the operation at the time the injury occurred. But Foster does not deny he was responsible for retrieving the wire rope that ultimately severed the victim's fingers. And even if Foster is correct about the extent of his involvement, his argument overlooks the special committee's finding that those involved should not have made *any* efforts to move the block without supervision as the wire was "jerry-rigged and dangerous."

3. Dismuke's Race Discrimination Claim

Dismuke asserts defendants discriminated against him by (1) wrongfully refusing to promote him to foreman or appoint him as a permanent lead person or key person, (2) unfairly disciplining him, and (3) requiring him to operate certain machinery without providing him with premium pay.[10] He has failed to raise a triable issue as to any of these points.

a. *Failure to Promote*

Dismuke was promoted to lead person in 2009. Since that time, Dismuke has worked as lead person about 80 percent of the time. However, Dismuke was never promoted to a permanent foreman position. Other non-African-Americans were promoted to foreman. Defendants also declined to appoint Dismuke as a permanent "key person," which would have protected him from layoffs. Instead, Rafael Rodriguez was appointed to the position.

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[10] Dismuke's other claims for race discrimination are time-barred. Dismuke asserts the statute of limitations is tolled by the continuing violations doctrine. However, many of the earlier instances of alleged discrimination cited by Dismuke, including his demotion in 2009 and BAE's refusal to transfer him to Hawaii, are clearly discrete events, dissimilar to others that occurred during the statutory period. Moreover, as discussed above, to invoke the continuing violations doctrine, a plaintiff must show at least one of the discriminatory acts occurred within the statute of limitations. (*Morgan v. Regents of University of California, supra,* 88 Cal.App.4th at p. 64.) Here, Dismuke has failed to raise a triable issue as to any of the more recent instances of alleged discrimination discussed in his brief.

The evidence shows defendants had nondiscriminatory reasons for refusing to promote Dismuke to foreperson or a permanent key person position. According to Rodolfo Edora, the manager of the steel department, Dismuke lacks the blueprint reading skills "essential" for a foreman. Likewise, Edora stated he selected Rodriguez over Dismuke for the key person position because of Rodriguez's superior blueprint reading skills. These points are undisputed, as Dismuke has conceded his blueprint reading abilities are " 'Poor.' "

Dismuke argues there is a triable issue as to whether he was qualified to be foreman because David King, a superintendent for the steel department, testified Dismuke was "hard worker" and a "go-to guy." King also testified: "If I needed to get a project done, [Dismuke] had good relations with the other crafts, it would just streamline a project to have him run it." But King was never asked about Dismuke's ability to perform as a foreman or key person, nor did he provide any testimony on his blueprint reading skills.

In a related argument, Dismuke asserts he was discriminated against because defendants required him to perform the work of a foreman, but without giving him the title or the pay. The record indicates Dismuke was assigned supervisory responsibilities immediately after his foreman was fired for striking a supervisor. Dismuke asserts defendants should have promoted him to foreman, but instead they kept him as a lead person. However, as discussed above, the evidence suggests Dismuke was not qualified for a promotion to foreman. Moreover, Dismuke's testimony indicates his foreman responsibilities were only temporary.

b. *Unfair Discipline*

Dismuke also claims he was unfairly disciplined on two occasions. The first was a corrective action form issued in February 2010, after a ship caught fire as a result of welding operations on the vessel. Dismuke was a lead person on the project. Dismuke asserts he was in the dry dock when the fire started, and he was not responsible for supervising the welding on the ship. Dismuke also believes Henry Phan, who is Asian and was in charge of the welders on the ship, was not written up.

This incident does not raise a triable issue for the jury. As an initial matter, it appears Dismuke was not blameless. Defendants have presented evidence showing supervisory employees are responsible for verifying a worksite has been properly prepped before " 'hot work,' " such as welding, commences. Thus, while Dismuke might not have had a torch in his hand, as one of the supervisors onsite, he did have responsibility for ensuring a safe work environment. Moreover, Dismuke can only speculate as to whether Phan was not also disciplined for the accident. When asked how he knew Phan was not written up, Dismuke responded he would have heard about the discipline because "that's something that people discuss."[11]

As to the second disciplinary incident, Edora issued Dismuke a verbal warning for not taking steps to enforce company policy against smoking on yard premises. Dismuke had been standing next to Lou Gonzalez, a shipfitter foreman, as he smoked. Gonzales was also issued a verbal warning. While it might have been unfair to punish Dismuke for failing to stop a foreman from smoking, there is evidence the verbal warning merely served as a reminder of company safety rules, and did not in any way affect Dismuke's prospects for advancement or continued employment. Accordingly, the warning cannot serve as a basis for a discrimination claim. (See *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 392 [rejecting claim where there was "no evidence [employer] would, or was likely to, deny employment benefits or privileges to an employee who had received a letter of instruction"].)

c. *Premium Pay*

Dismuke asserts defendants required him to operate certain machinery without providing him with premium pay. But the record citations provided in Dismuke's briefing do not support this contention. They merely show Dismuke ran certain

[11] Defendants have also presented evidence Phan was not even working at the time of the fire. Dismuke argues defendants have the burden of demonstrating whoever was responsible for the welders was similarly disciplined. But defendants sustained their initial burden by showing that, because of the fire, there was a nondiscriminatory rationale for disciplining Dismuke. It was Dismuke's burden to raise a triable issue as to whether the proffered rationale was pretext.

machinery "[w]henever it was called for." There is no indication Dismuke was entitled to premium pay for operating the machinery, or that additional pay was withheld. Indeed, Dismuke's testimony on this point, although vague, could be construed as a statement he did receive premium pay for operating the machinery.

4. Coleman's Race and Gender Discrimination Claim

Coleman asserts defendants discriminated against her based on her race and gender by (1) failing to train her to stencil and use the spray gun, (2) refusing to promote her to lead person, (3) assigning her undesirable jobs, and (4) engaging in discriminatory layoffs.[12] The trial court properly granted summary judgment as to all of these claims.

a. *Failure to Train*

Coleman asserts BAE consistently refused her requests for training on the spray gun and stencil punch. Analyzing the federal antidiscrimination statute, federal courts have held "[a]n employer's denial of an employee's request for more training is not, without more, an adverse employment action." (*Griffith v. City of Des Moines* (8th Cir. 2004) 387 F.3d 733, 737.) Coleman argues this authority is inapposite because the FEHA expressly forbids discrimination in training. But the FEHA provisions cited by Coleman relate to situations where an employer discriminates by refusing to select the plaintiff for a training program "leading to employment." (§ 12940, subds. (a), (c).) In this case, it is undisputed BAE did not provide a formal training program for the skills at issue.

Moreover, there is no indication Coleman's purported lack of formal training materially affected her employment or prospects for promotion during the statutory period. She testified she had received on-the-job training from a coworker, and even volunteered to provide training to other employees. Coleman, a journeyman painter, also testified a painter could not advance to her position without being able to use a spray gun.

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[12] Coleman also claims defendants discriminated against her because they did not discipline Valenzuela for calling her a " 'fucking bitch,' " but did discipline Coleman for calling Valenzuela " 'another fucking bitch with his bean-eating ass.' " As discussed above, this claim is time-barred. (See section II.B.4., *ante*.)

In her reply brief, Coleman argues she was passed over for promotion due to defendants' failure to train. But the deposition testimony to which Coleman cites does not attribute her lack of advancement to a failure to a train or proficiency with the spray gun or stencil punch. And as discussed below, Coleman has actually turned down offers for promotion.

It is also unclear from the record who made the decision to deny training to Coleman, and in any event, Coleman has not presented evidence suggesting animus motivated that decision.

b. *Failure to Promote*

We next address and reject Coleman's claim that she was unfairly passed over for a promotion to lead person.

Coleman served as a lead person for about six months before BAE took over management of the shipyard. According to Coleman, she stepped down from the position because Hispanic employees "didn't want to listen to anything [she] had to say." As a result, she told Vaught "that was [the] last job I would like to run." Later, Vaught approached Coleman about taking some laborers and painters to clean the dry dock. Coleman told Vaught, ". . . I would go down there, but I did not want to be lead person." Coleman also testified she did not tell any of her paint superintendents she wanted her lead person position back.

Based on this evidence, we cannot conclude defendants had a discriminatory motive for failing to promote Coleman to lead person. Rather, it appears Coleman expressed no interest in the position. Coleman argues she expressly requested a promotion. But the deposition testimony she cites in support merely indicates she was not promoted. Coleman also argues she was once offered a lead person position, and the offer was retracted without explanation. Again, it is unclear whether Coleman even wanted the position. She testified Dan Lambert offered her a lead person job working a cruise ship. Coleman said she would accept the offer on the condition that she receive a "blue sweat jacket[]." After the position was filled by someone else, Coleman "left it alone." Further, this claim appears to be time-barred as Coleman indicated it occurred before she was employed by BAE.

Moreover, Coleman's assertion that only male Latino painters were promoted to lead person is contradicted by her own deposition testimony. When asked to list the employees assigned as lead persons in the paint department since she left the post, Coleman named three African-Americans and only two Latinos, even though she estimated about 90 percent of the painters in her department were Latino. We cannot infer defendants discriminated against Coleman on the basis of her race where other African-Americans were promoted over her and the other non-African-Americans in her department.

c. *Discriminatory Job Assignments*

Coleman asserts she and other African-American painters have been subjected to discriminatory job assignments. According to Coleman, the best and the easiest part of the job is painting. The rest of the work is strenuous and difficult. These difficult work assignments include sandblasting, shoveling sand, and cleaning out sea chests and sump pumps. Coleman testified a Latino lead person would give African-Americans "all the worst jobs he could find, the strenuous jobs, and give all the clean jobs to . . . the Latino people that's . . . been his friends for years." Coleman also asserts Latino supervisors assigned tasks in Spanish, leaving African-American painters without specific work assignments.

Defendants argue the assignment of less desirable tasks is not an adverse employment action under the FEHA. An adverse employment action affects the "terms, conditions, or privileges of employment." (§ 12940, subd. (a).) The term "adverse employment action" "must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1054, fn. omitted.) But not every change in the conditions of employment constitutes an adverse employment action. (*Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357 (*Malais*).) " '[W]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the

level of a materially adverse employment action.' " (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511.) Thus, a "plaintiff must show the employer's . . . actions had a detrimental and substantial effect on the plaintiff's employment." (*McRae v. Department of Corrections & Rehabilitation*, *supra*, 142 Cal.App.4th at p. 386.)

Coleman has not made such a showing here. There is no dispute the "dirty work" of which she complains falls within her job duties as a painter. Indeed, there is evidence the painters fought to take on these duties so they would not be laid off when they completed more traditional painting work. Nor is there is any indication Coleman was paid less for this work, or that the work affected her prospects for advancement or promotion. As discussed above, Coleman concedes she learned to paint well enough to advance to journeyman status, and the evidence indicates she has not sought further promotion. Thus, without more, the evidence presented by Coleman is insufficient to raise a triable issue on her discrimination claim. (See *Malais*, *supra*, 150 Cal.App.4th at p. 358 [finding no adverse employment action "in transfers that involved working in assignments the employee preferred less than other assignments but with equal pay, benefits, [and] promotional opportunities"].)

The supervisors' practice of assigning work in Spanish is also insufficient to create a triable issue. There is no indication Coleman suffered an adverse employment action as a result. Moreover, one of the supervisors who engaged in this practice was reprimanded and demoted from lead person to journeyman. Another supervisor was verbally warned. BAE also posted signs saying the company policy was to provide work assignments in English.

d. *Discriminatory Layoffs*

Finally, Coleman argues she was repeatedly subjected to discriminatory layoffs. However, the record reflects only one instance when Coleman was laid off and a less senior painter was kept on the job. Coleman complained, though she cannot remember whether a grievance was filed, and she was provided with back pay as compensation for the hours lost. As the matter was quickly resolved and Coleman has already been

compensated for her loss, these facts are insufficient to raise a triable issue as to discrimination.

5. Brooks's Discrimination Claims

Brooks's discrimination claims are based on defendants' purported failure to train and discriminatory layoffs. We find Brooks has failed to raise a triable issue as to any of these points.

a. *Failure to Train*

Brooks asserts defendants wrongfully denied her requests to train for other jobs, including work as a welder trainee, recertification as a manlift[13] operator, certification as a forklift operator, and work on waterblasting operations or as a needle gun operator and grinder. But defendants have presented evidence they had nondiscriminatory reasons for denying Brooks's requests.

There is evidence Brooks was ineligible to train as a welder since she was represented by the laborers union and welder trainees must be represented by the boilermakers union.[14] There is also evidence defendants allowed another African-American to train as a welder during the relevant period because he was a member of the boilermakers union and was recommended for the post. Brooks argues she could and would have joined the appropriate union had BAE not discriminatorily refused to allow her to train her as a welder. But Brooks offers no supporting record citations, and in any event it is unclear from her summary judgment declaration what she was willing or able to do to obtain the welder trainee position.

Brooks claims she requested recertification for her manlift license in or around September 2011, but when it was time for the certification training, she "was given the run around." According to the general foreman of the sheet metal department, Brooks

[13] According to defendants, a manlift is a motorized scaffold with a bucket or platform that raises its occupants above the ground.

[14] Brooks also claims defendants' refusal to allow her to train as a welder amounts to a failure to promote. This claim fails for similar reasons. Moreover, as defendants argue, Brooks would have made less money as a welder trainee.

was scheduled to receive the training but missed work on that day. Brooks argues this is merely pretext, suggesting she might not have been on duty the day of the training, and she should have been given the opportunity to take the class on another occasion. But she cites no evidence in support of these arguments, and otherwise fails to show defendants' explanation is implausible. (See *Horn*, *supra*, 72 Cal.App.4th 798, 807.)

Nor is there a triable issue as to whether animus motivated defendants' failure to provide Brooks with a forklift certification. According to the general foreman of the sheet metal department, forklift training has not been provided to any employees since at least 2008. Brooks argues this statement does not provide a valid business justification for failing to train her. To the contrary, this evidence shows Brooks was not singled out in any way and defendants had a legitimate, nondiscriminatory reason for denying her requests. Brooks has not presented any contrary evidence which would suggest this rationale for failing to provide forklift training was pretext.

A larger problem with Brooks's arguments concerning forklift and manlift training, as well as her other training claims, is that she has failed to establish defendants' conduct rises to the level of an adverse employment action. As discussed above, "[a]n employer's denial of an employee's request for more training is not, without more, an adverse employment action." (*Griffith v. City of Des Moines*, *supra*, 387 F.3d at p. 737.) Here, there is no indication Brooks was terminated, paid less, laid off, or passed over for promotion based on defendants' purported failure to train. That Brooks may have preferred to perform other tasks is irrelevant if the terms and conditions of her employment remained the same.

b. *Discriminatory Layoffs*

The evidence shows Brooks has been laid off and called back several times during the statutory period. On all but one of those occasions Brooks was called back before others with less seniority. The one exception occurred in March 2011, when a "non-black" worker was called back before Brooks, even though Brooks was first on the seniority list. Lester Gonzales, a superintendent, told Brooks she was not called because

she refused to perform certain types of work. Brooks filed a grievance against BAE under the CBA and subsequently received a settlement.

We are not convinced these facts raise a triable issue for the jury. Gonzales expressed a nondiscriminatory reason for not calling back Brooks first: she refused to perform certain tasks that needed to be done at the time. Brooks disputes this claim, but she has not presented any facts which would suggest Gonzales's actions were motivated by animus as opposed to a mistake of fact. The inference of animus is further undermined by the fact BAE complied with the seniority rules in every other layoff and callback with which Brooks was involved. Moreover, BAE has already settled the issue and compensated Brooks for time lost. Indeed, Brooks concedes she suffered no economic damages as a result of the incident. Citing *Camargo v. California Portland Cement Co*. (2001) 86 Cal.App.4th 995, Brooks argues the settlement is irrelevant. But *Camargo* merely holds an employee who brings an unsuccessful contract claim in an arbitration under a collective bargaining agreement may not be collaterally estopped from later filing a related FEHA claim. (*Camargo*, at p. 1005.) It does not state an FEHA plaintiff may proceed with a discrimination claim where he or she was promptly compensated for the alleged loss.

D. *Retaliation*

1. Applicable Law

To establish a prima facie case for retaliation, an employee must show: "(1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz, supra*, 36 Cal.4th at p. 1042.) Like claims for discrimination, retaliation claims are subject to the *McDonnell Douglas* burden-shifting analysis (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1108–1109 (*Loggins*)), which is discussed above. (See section II.C.1., *ante*.) In the context of an employer's motion for summary judgment, the employer must produce substantial evidence negating an essential element of the plaintiff's case or showing a legitimate, nondiscriminatory reason for its conduct. (See Chin et al., Cal. Practice Guide:

Employment Litigation, *supra*, ¶¶ 19:728–19:729, p. 19-117.) The burden then shifts to the plaintiff to rebut the defendant's showing by producing substantial evidence raising a rational inference that retaliation occurred. (See *ibid.*)

2. Foster's Retaliation Claim

Foster bases his retaliation claim on three purportedly adverse employment actions. He has failed to raise a triable issue as to any of these claims.

First, Foster asserts defendants disciplined him in May 2012 to punish him for his deposition testimony in this case. As discussed above, the stated reason for the May 2012 discipline was that Foster was involved in a workplace accident which resulted in another employee losing several fingers. Foster's claim fails because there is no causal connection between the discipline and protected activity. As an initial matter, defendants have enunciated a legitimate reason for disciplining Foster. Moreover, the discipline occurred over 19 months after Foster filed his DFEH complaint. (See *Loggins*, *supra*, 151 Cal.App.4th at p. 1110, fn. 6 [adverse employment action must follow within a relatively short time of the protected activity].) Foster's attempt to connect the discipline to his later deposition testimony, rather than the filing of his action, is unpersuasive, as his deposition testimony was part and parcel of his civil action.

Second, Foster argues defendants retaliated against his request for additional lead person pay, which equated to an additional $1 per hour, by relieving him of his lead person duties. We are not persuaded. To establish a claim for retaliation, employees must show they were discriminated against because they opposed practices forbidden by the DFEH or because they filed a complaint, testified, or assisted in any DFEH action. (§ 12940, subd. (h).) Foster's request for additional pay had nothing to do with any of these protected activities. Nor is there any indication he suggested the pay disparity was due to his status as an African-American when he first made the request for additional pay. Moreover, there was a legitimate reason for relieving Foster of his lead person duties. According to Foster, Dan Lambert made the decision because another employee, Mike Gerbracht, stated Foster was "letting people stand around on the dry dock not

working." While Foster disputes this account, he has offered no evidence either Lambert or Gerbracht harbored a discriminatory intent.

Third and finally, Foster asserts defendants laid him off in late 2010 because he complained when they refused to protect his seniority rights after he transferred to the paint department. For reasons similar to those discussed above, we are not convinced Foster's complaints about his loss of seniority amounted to protected activity under the DFEH. Even if they were, Foster testified he was not the only one laid off on this particular occasion. Everyone in the department with less seniority than Foster was also let go. And Foster has failed to present any evidence defendants' decision to lay off a number of employees due to a lack of work was pretextual.

3. Dismuke's Retaliation Claim

In Dismuke's opposition to defendants' motion for summary judgment, he cited only one instance in which defendants allegedly retaliated against him. Specifically, Dismuke asserted a supervisor threatened to dock his pay while he was doing a walkthrough of the yard with his attorney in connection with this case, even though the walkthrough did not occur during his work shift. The problem with this theory is that defendants ultimately paid Dismuke in full for the time in question. Dismuke argues the issue was corrected only because he complained about it and defendants should not be permitted to make retaliation claims "disappear" by correcting a problem after it is brought to their attention. But defendants quickly dealt with the issue before Dismuke suffered any loss. Moreover, it is unclear whether the supervisor who threatened him understood that the walkthrough would not occur during his shift.

Dismuke raises a number of new retaliation claims in his appellate briefing. We need not consider these new retaliation claims because they were not raised below and they do not present pure questions of law. (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.) In any event, Dismuke's other retaliation claims largely overlap with his claims for discrimination, and fail for similar reasons.

4. Coleman's Retaliation Claim

Coleman asserts she was subjected to retaliation on two occasions. The first occurred after she complained to her supervisor about an incident of sexual harassment that occurred before BAE took over the yard. To the extent the conduct complained of constitutes retaliation, it is time-barred as it occurred several years before Coleman filed her complaint. As to the second incident, Coleman asserts Vaught and Vanderspek refused to talk to her after she filed the instant action. But this is not an adverse employment action, since it did not materially affect the terms or conditions of Coleman's employment. (See *McAlindin v. County of San Diego* (9th Cir. 1999) 192 F.3d 1226, 1238–1239 [plaintiff's retaliation claim could not be based on allegation that coworkers "ignored him" because "sense of isolation is not actionable"].) In her reply brief, Coleman argues Vaught's and Vanderspek's silence has interfered with her job duties, but she has pointed to nothing in the record for support.

5. Brooks's Retaliation Claim

In May 2012, Brooks was laid off from her fire watch duties. She has not been recalled to work since. Brooks asserts the layoff was in retaliation for filing the instant action. She points out she attended Vanderspek's deposition in January 2012, and believes she "came to his attention" during that time. She also asserts she should have been recalled to work earlier because her duties were assigned to another African-American woman who was capable of doing more skilled work.

This claim does not raise a triable issue for the jury. As an initial matter, the causal link to a protected activity is too tenuous. The layoff occurred over a year after Brooks filed her complaint with the DFEH, and we fail to see the connection between the conduct complained of and Vanderspek's deposition. More importantly, seven other utility workers with less seniority, including three Pacific Islander males and an Asian male, were laid off from fire watch duties at the same time as Brooks. Based on this evidence, it seems clear the layoffs were made for business reasons, not to retaliate against Brooks for filing the instant action.

E. *Costs*

1. Referee's Fees

Plaintiffs argue the trial court erred in awarding discovery referee fees as costs. We agree.

In July 2011, defendants moved for a protective order and for the appointment of a discovery referee. Plaintiffs' opposition to the motion was based, in part, on their inability to pay the referee's fees. Plaintiffs submitted declarations in support of their opposition stating they are indigent and cannot afford the cost of a referee. The trial court granted defendants' motion and appointed a referee. The court found the "exceptional circumstances" of the case warranted the appointment, as there was "already an unusual amount of discovery disputes" and "there [was] likely to be additional contentious discovery disputes in the future." The referee's maximum hourly rate was set at $600 per hour. The court found it was appropriate to assign 100 percent of the referee's fees and costs to defendant, but made the finding without prejudice to defendants' right to request an alternative apportionment at a later date.

After prevailing on their motions for summary judgment and judgment on the pleadings, defendants sought to recover $32,925.96 in referee fees.[15] The trial court denied plaintiffs' motions to tax these costs. At a hearing on the matter, the court explained: "Not only do I think that the use of a discovery referee was reasonable to the conduct of the litigation, it was essential. In the long run, it saved everybody a bunch of money, but that's not what essential is all about. [¶] What's essential is that this case would have been bogged down horrifically without access to a judicial officer . . . to call balls and strikes and avoid yet further motion practice which would mean yet further filing fees for motions, attorney's fees, . . . and court costs."

As defendants point out, referee's fees have been found to be a recoverable cost pursuant to Code of Civil Procedure section 1033.5, subdivision (c)(4), which states:

[15] Defendants sought $8,977.15 from Foster, $8,561.55 from Dismuke, $13,185.49 from Coleman, and $2,201.77 from Brooks.

"Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion." (See *Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 Cal.App.4th 592, 604–605 (*Baker-Hoey*); see also *Most Worshipful Lodge v. Sons etc. Lodge* (1956) 140 Cal.App.2d 833 (*Most Worshipful Lodge*); *DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279 (*DeBlase*).) But that does not end the inquiry. Pursuant to Code of Civil Procedure section 639, a referee may only be appointed under certain circumstances. Among other things a trial court must first make a finding that either (1) "no party has established an economic inability to pay a pro rata share of the referee's fee," or (2) "one or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that additional share of the referee's fee." (Code Civ. Proc., § 639, subd. (d)(6)(A).) "A court shall not appoint a referee at a cost to the parties if neither of these findings is made." (*Ibid.*) The legislative history of Code of Civil Procedure section 639 indicates its purpose is to "prohibit[] court appointment of referees unless the parties are able to pay the fees" and to "address criticisms that references are being made in inappropriate cases and at an unreasonable cost to the parties forced to accept the reference." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2912 (1999–2000 Reg. Sess.) as amended July 6, 2000, p. 5, par. 3.)

Defendants argue nothing in Code of Civil Procedure section 639 precludes trial courts from awarding referee's fees as costs to a prevailing party. They are only partially right. While section 639 does not bar prevailing parties from recovering referee fees in all circumstances, it also does not allow a court to impose such fees on indigent parties. The plain language of section 639, subdivision (d)(6)(A) clearly indicates a referee may not be appointed in the first instance unless both parties can afford the referee's fees or one party voluntarily agrees to assume the entirety of the fees. Neither condition was met here. The trial court order appointing the referee stated it was appropriate to assign 100 percent of the fees to defendants, and granted defendants the right to request an alternative apportionment at a later date. The court failed to determine whether plaintiffs could afford to pay for the referee—despite plaintiffs' declarations stating they were

indigent—or whether defendants were willing to voluntarily assume all of the fees. The court also left open the possibility plaintiffs would be held responsible for some or all of the referee's fees. The error was later compounded by the trial court's decision to apportion 100 percent of the fees to plaintiffs without any analysis of their ability to pay.

Defendants' authority on this point is inapposite. *Most Worshipful Lodge* and *Baker-Hoey* held a referee's fees could be taxed as costs, but did not comment on whether those costs could be imposed on an indigent party. (*Most Worshipful Lodge*, *supra*, 140 Cal.App.2d at pp. 834–835; *Baker-Hoey*, *supra*, 111 Cal.App.4th at pp. 604–605.) In *DeBlase*, the court acknowledged that requiring an indigent litigant to pay a referee's fees is inconsistent with the statutory scheme and stated that, "in those cases where a party claims indigence, a trial court should be prepared to devote more of its own time studying the merits of a discovery dispute than it otherwise would." (*DeBlase*, *supra*, 41 Cal.App.4th at p. 1284.) Even if *DeBlase* can be read to state a prevailing party is entitled to recover referee's fees from an indigent party, the case was decided before the 2000 amendments to Code of Civil Procedure section 639, which added the requirement that trial courts make specific findings regarding parties' ability to pay. (Stats. 2000, ch. 644, § 2.)

Nor does *Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950 support defendants' position. In that case, the court rejected the plaintiffs' unconscionability challenge to a contractual provision requiring the parties to submit their dispute to a referee. (*Id.* at p. 954.) The court observed that, pursuant to Code of Civil Procedure sections 639 and 645.1, the referee's fees would be apportioned in a fair and reasonable manner, in consideration of the parties' ability to pay. (*Trend Homes*, at p. 962.) The court stated if the plaintiffs were unable to pay the fees, the trial court would likely require the defendant to pay most, if not all of them. (*Ibid.*) The plaintiffs argued that, even if the trial court apportioned payment of the fees entirely to the defendant in the first instance, the plaintiffs could ultimately be held responsible for the fees if they did not prevail in the action. (*Ibid.*) The court conceded the referee's fees were recoverable by the prevailing party, but concluded this did not render the contract

unconscionable or one-sided since either party could lose. (*Ibid.*) As the allocation of referee's fees was not directly at issue in *Trend Homes*, any suggestion by the court that an indigent plaintiff could be held liable for a referee's fees is mere dicta. Moreover, the court's statement regarding a prevailing party's entitlement to fees was based on *DeBlase* and *Most Worshipful Lodge*, both of which were decided before the 2000 amendments to Code of Civil Procedure section 639.

Since the trial court's orders appointing the referee and apportioning his fees were in error, we reverse and remand for consideration of the parties' ability to pay.

2. Inc. and Ship Repair's Costs

Inc. and Ship Repair were awarded costs after the court granted their motions for judgment on the pleadings as to each of the plaintiffs. The motions were granted on the ground plaintiffs had not named either Inc. or Ship Repair in their FEHA complaints, and thus had failed to exhaust their administrative remedies. Plaintiffs argue this defect should have been obvious from the outset of the case, and as a result most of the costs accrued during the two years before Inc. and Ship Repair filed their motions for judgment on the pleadings were not reasonably necessary to the litigation. We are not persuaded.

Pursuant to Code of Civil Procedure section 1033.5, subdivision (c)(2), "Allowable costs shall be *reasonably necessary* to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (Italics added.) This limitation applies to costs allowable at the discretion of the court, as well as costs otherwise allowable as a matter of right. (*Perko's Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal.App.4th 238, 244–245.) For example, in *Perko's*, the trial court erred in failing to consider whether a filing fee was a necessary cost where the pleadings were filed after the issue which was the subject of the pleadings had been decided. (*Id.* at pp. 241, 245.)

Here, the trial court considered and rejected plaintiffs' contention that Inc. and Ship Repair could have reduced their costs by doing nothing more than file a demurrer concerning administrative exhaustion early on in the litigation. The court reasoned that, if defendants had raised the issue earlier, plaintiffs may have been able to amend their administrative complaints before the statute of limitations expired. According to the trial

court, Inc. and Ship Repair's decision to wait to file a motion for judgment on the pleadings later on was a prudent litigation strategy.

Plaintiffs argue Inc. and Ship Repair still cannot justify incurring costs for depositions, motion fees, and witness fees while they "were waiting to spring their trap." We disagree. There was no guarantee the trial court would grant Inc. and Ship Repair's motions for judgment on the pleadings, and the costs associated with preparing for that possibility were reasonably necessary to the conduct of the litigation. Plaintiffs also argue Inc. and Ship Repair would have been no worse off if they had relied on the other defendants' discovery efforts since their interests and defense overlapped and they shared the same counsel. We need not consider this argument as it was raised for the first time on reply. In any event, plaintiffs have pointed to no case law suggesting a defendant can reasonably be expected to depend on a codefendant to represent its interests during discovery.

3. *Williams v. Chino Valley Independent Fire Dist.*

Although defendants' costs were reasonably necessary to the conduct of the litigation, they still may not be able to recover any of them from plaintiffs. Pursuant to our Supreme Court's recent decision in *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, a prevailing defendant in a discrimination action "should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so." (*Id.* at p. 115.) In supplemental briefing requested by the court, defendants assert plaintiffs waived any arguments based on *Williams* by failing to raise them below or in their appellate briefing. But plaintiffs did not have an opportunity to address this issue earlier, as *Williams* was not decided until after the bulk of briefing in these appeals was completed. Defendants also assert the award of costs was justified because plaintiffs' claims are frivolous. This is a question that should be addressed by the trial court in the first instance, especially since the record may be further developed on this issue. Accordingly, the trial court's award of costs is reversed and remanded.

III. DISPOSITION

The trial court's orders granting defendants' motions for summary judgment are reversed as to Foster's claim for harassment against BAE, Vaught, and Vanderspek, and Dismuke's claim for harassment against BAE and Vanderspek. The trial court's summary judgment orders are affirmed in all other respects. The award of costs is reversed and remanded for a determination consistent with this opinion. The parties shall bear their own costs on appeal.

_____
Margulies, J.

We concur:

_____
Humes, P.J.

_____
Dondero, J.